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SEP 30 2004

Federal Communications Commission
Office of Secretary

September 30, 2004

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation;
WT Docket No. 02-55

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this notice is being filed. On Thursday, September 30, 2004, Mark J. Abrams of Mobile Relay Associates, John Komorowski and Dan Hardway of Skitronics, LLC, and I met with Michael Wilhelm, Chief, Public Safety and Critical Infrastructure Division, and Brian Marenco of his staff.

During the meeting, the undersigned delivered copies of the attached presentation to the FCC staff attendees. The parties discussed the issues raised in the attachment, and whether those issues were susceptible to resolution by means of an Erratum. In addition, Mr. Wilhelm asked whether there was specific language that could be incorporated into the rules to address the concerns raised in the attachment, and invited the parties to make a supplemental written *ex parte* presentation containing same. The parties indicated that they would accept such invitation, and intend to prepare and file such a written *ex parte* presentation next week.

An original and one copy of this letter are submitted for inclusion in the file of the above-referenced proceeding. Please direct any questions to the undersigned.

Sincerely,

David J. Kaufman

Enclosure
cc (w/encl.): Michael Wilhem, Esq.
Brian Marenco
Mobile Relay Associates
Skitronics, LLC

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WHY THE *REBANDING DECISION* UNDERVALUES THE 800 MHz SPECTRUM NEXTEL IS RECEIVING

I. By Exchanging Site-Based-Encumbered 800 MHz Spectrum for Virgin 800 MHz Spectrum, Nextel Reaps a Windfall for Which the Commission Did Not Adequately Account

As Mobile Relay Associates ("MRA") and Skitronics, LLC ("Skitronics") (collectively, the "Site-Based Licensees") showed below (*e.g.*, MRA Written *Ex Parte* Presentation filed October 25, 2002, "MRA Valuation Presentation"), site-based "holes" (*i.e.*, site-based 800 MHz licenses) in the middle of EA auction license "donuts" were worth a considerable amount. Thus, for example, MRA stated, without rebuttal from any other party, that its 800 MHz SMR channels in Denver, Colorado would be diminished in value by $2,160,000 if the rebanding proposal went through. *Id.* (MRA holds 1.8 MHz of site-based 800 MHz spectrum in Denver, of which 1.35 MHz is co-channel to surrounding auction licensees.)[1]

This was based upon MRA's actual experience in the secondary markets, where the arms'-length resale price of that spectrum was over $100,000 per channel until the FCC announced its Notice of Proposed Rule Making ("*NPRM*") in this proceeding, at which point all demand for the spectrum immediately evaporated, as was the case in virtually all major markets.[2] Denver is only a mid-sized market; arms'-length prices in markets such as New York and Los Angeles exceeded one million dollars per channel, and demand for 800 MHz spectrum in those markets also evaporated at the same time. Nevertheless, if the *Rebanding Decision* were overturned on appeal, or were modified to provide that auction licensees would have the same site-based holes inside their donuts after the move to the upper 800 MHz spectrum, the former arms'-length prices would immediately be re-established.

The Commission set up a particular playing field at 800 MHz, and all parties conducted themselves based upon the parameters of that playing field. Central to that playing field was the Commission's announcement that incumbent licensees in the General Category and lower 80 SMR spectrum would not be subject to forced migration for the benefit of the auction winner, that only so-called "white space" was to be auctioned. The Site-Based Licensees reasonably relied upon those Commission rules.

If the 800 MHz spectrum currently occupied on a shared basis by both the Site-Based Licensees and auction licensees is required to be "condemned by eminent domain" for the benefit of Public Safety, then in their forced migration to new 800 MHz spectrum, Site-Based Licensees and

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[1]This $2,160,000 does not represent the pre-*NPRM* value of the MRA 800 MHz spectrum, only the difference between the pre-*NPRM* spectrum value and the value of MRA's proposed replacement 800 MHz spectrum, if the *Rebanding Decision* were to be implemented.

[2]Nextel participated in numerous secondary market transactions, thus Nextel did not dispute the MRA factual showing in the MRA Valuation Presentation.

auction licensees should move together to share the replacement spectrum as they did their former spectrum. Auction licensees have no entitlement to own the "holes" in their donuts (unless they choose to purchase them at arms'-length from Site-Based Licensees), and the forced migration for the benefit of Public Safety does not create any such entitlement. Nor, manifestly, is there any need to deliver these "holes" to the auction licensees in order to accommodate the supposed need of Public Safety to move.

In other words, by providing that all auction licensees now suddenly gain a windfall of site-based licensees being eliminated for free, the FCC is giving Nextel (and other major auction licensees such as Southern Linc) at least a billion dollars in added spectrum value, which was not accounted for adequately in the *Rebanding Decision*.

Manifestly, the site-based "holes" are the most valuable spectrum, not merely on an absolute basis, but even on a per MHz-pop basis. First, the greatest call volume occurs while people are in the central parts of a metro area, during the "peak" calling hours (which correspond to the work day plus rush-hour drive times). Since, during these peak hours, the population is shifted into the central core, the call volume there is much higher there than even its higher residential population density would suggest. Second, because the call density is so much greater in the central core of a metro area, more channels are needed there than are needed in outlying areas to maintain an adequate grade of service. Thus, it is in these core areas that spectrum scarcity becomes an issue, and spectrum scarcity is a prime factor in spectrum valuation.

However, the *Rebanding Decision* works from the assumption that all co-channel spectrum is of equal value, without regard to whether it covers a central core or only an outlying area, without regard to whether there are capacity constraints which drive up value, or a spectrum glut. Thus, at ¶¶ 321-22, the Commission assumes that the 1.78 MHz of site-based 800 MHz General Category spectrum in the central cores of metro areas[3] is worth no more on a per MHz-pop basis than is the co-channel spectrum owned by Nextel in outlying areas, severely overstating the value of the General Category spectrum which Nextel is relinquishing, and understating the value of the new, incumbent-free NPSPAC spectrum that Nextel is receiving.

II. Nextel's New, Site-Based Licensees-Free 800 MHz Spectrum Is Worth More Than 1.9 GHz Spectrum on a per MHz-Pop Basis.

The *Rebanding Decision*, ¶ 323, actually holds that Nextel's new, site-based Licensees-free 800 MHz spectrum is worth 27% less than 1.9 GHz spectrum on a per MHz-pop basis. This is backwards, as the 800 MHz spectrum would be worth approximately that much more than 1.9 GHz

[3]For purposes of this *ex parte* presentation, we assume *arguendo* that the 1.78 MHz figure is accurate.

spectrum on a per MHz-pop basis. Unlike the 1.9 GHz spectrum, Nextel can use the 800 MHz spectrum with its existing infrastructure equipment and without having to change out any of the millions of customer units now in the hands of its subscribers. All that would be required would be the retuning of existing base station equipment and the remote reprogramming of phones. This represents a huge savings in both money and personnel resources. It also represents a huge savings in the type of customer churn which the various TDMA carriers (such as Cingular and AT&T) suffered during their transition to GSM technology. In the normal course, until the new technology overlay is completed, there will inevitably be system "dead spots" that lead to customer dissatisfaction and churn. However, here, Nextel will be able to avoid that problem, thanks to its new, virgin 800 MHz spectrum at the top of the 800 MHz band. Again, this error in valuation created a billion dollar windfall for Nextel.

III. Similarly-Situated Licensees Must Be Treated Similarly

Throughout the *Rebanding Decision*, the Commission reiterates that the current situation (of supposed crisis for Public Safety) is not Nextel's fault (¶ 300), and that therefore Nextel cannot be forced to cede spectrum without receiving equivalent value in return. *See, e.g.,*¶¶ 5, 12, 72, 211-12. The continued emphasis is upon value-for-value, not MHz-pop for MHZ-pop, as the Commission acknowledges that different spectrum is not fungible and that some spectrum is more valuable than other spectrum. *Id.*, ¶¶ 16, 32, 278. Similarly, the Commission goes out of its way, carving out special exceptions to its new 800 MHz channel configuration plan, just to accommodate a favored licensee, Southern Linc, to make certain that at the end of the day, Southern Linc will have received value-for-value with respect to spectrum lost and gained. *Id.*, ¶¶164-69 & App. G.

However, despite the fact that Site-Based Licensees raised their need for similar treatment in various pleadings and *ex parte* meetings with Commission staff,[4] the Commission declined to afford similar treatment to Site-Based Licensees and others in their class of licensees. Instead, the Commission confiscates Site-Based Licensees' existing spectrum and replaces it with far less valuable spectrum, destroying Site-Based Licensees' respective balance sheets. The Commission made no attempt to justify this disparate treatment; rather, it chose not to discuss Site-Based Licensees' pleadings on this issue.

Patently, Site-Based Licensees are receiving replacement spectrum worth only a tiny fraction of the spectrum being confiscated from them. Site-Based Licensees currently hold SMR spectrum that

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[4]*See, e.g.*, MRA Reply Comments filed August 7, 2002, pp.6-8; MRA Comments to the Consensus Parties Reply Comments, filed September 23, 2002, pp.8-9; MRA Notice of Oral *Ex Parte* Presentation filed October 22, 2002; MRA Comments on Supplemental Comments of the Consensus Parties filed February 10, 2003, *seriatim*; MRA/Preferred/Silver Palm Joint Notice of Oral *Ex Parte* Presentation filed April 8, 2004 (Attachment, p.1); MRA Written *Ex Parte* Presentation filed June 14, 2004, *seriatim*.

traditionally has sold at a premium, both in Commission auctions and in the secondary markets. *See, e.g.* MRA Notice of Oral *Ex Parte* Presentation filed October 22, 2002 (Attachment, p.2); MRA Valuation Presentation, Attachment, p.1; MRA Comments on Supplemental Comments of Consensus Parties, filed February 10, 2003, pp.9-10; MRA/Preferred Joint Supplemental Comments filed July 15, 2003, *seriatim*; MRA Written *Ex Parte* Presentation filed June 14, 2004, p.1. But for the *Rebanding Decision*, this spectrum would either be available for Site-Based Licensees' long-term expansion via introduction of digital equipment (at a time of Site-Based Licensees' choosing based upon their unique needs and the evolving state of the equipment industry) or resale to others. The replacement spectrum will be forever barred from cellular usage and will have virtually no market value.

As noted, the Commission chose not to discuss this issue in the *Rebanding Decision*. The reason is that there is no possible justification for requiring that Nextel and Southern Linc receive value-for-value before migrating from their current spectrum, but not requiring the same thing with respect to innocent licensees such as Site-Based Licensees.

The Commission cannot discriminate within a class of licensees. *See, e.g., Telephone and Data Systems v. FCC*, 19 F.3d 655, 657 (DC Cir. 1994) ("*TDS II*"); *Telephone and Data Systems v. FCC*, 19 F.3d 42, 49-50 (DC Cir. 1994) ("*TDS I*"); *Melody Music v. FCC*, 345 F.2d 730 (DC Cir. 1965) ("*Melody Music*"). In the *Rebanding Decision*, the Commission modifies the licenses of its favored licensee, Nextel, only if and to the extent that Nextel voluntarily agrees in advance it is receiving benefits at least as great as the costs it would bear. At the same time, the Commission modifies the licenses of MRA and Skitronics involuntarily, eviscerates the fair market value of their licenses in doing so, and essentially confiscates their spectrum licenses.

Unless this unlawful discrimination is remedied by changing the *Rebanding Decision,* it is most likely going to be overturned as arbitrary and capricious agency action, inconsistent with *TDS I, TDS II*, and *Melody Music, supra*.[5]

Skitronics presents a typical real-world example of the unfairness of the disparate treatment in multiple ways. Skitronics holds both EA and site-based licenses, although virtually all of the EA

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[5]Nor can the discrimination against site-based licensees be justified on the ground that the unfairness only reaches a few, smaller licensees. First, the Constitution does not differentiate between the large and powerful vs. the small and powerless. Second, if it were true that only a handful of smaller licensees is involved in this issue (Nextel having allegedly already bought out virtually all of the others, *see Rebanding Decision*, ¶ 321), then the overall cost of the rebanding plan is not materially affected by holding that all Site-Based 800 MHz licensees that today hold cellular-permissible spectrum be given the opportunity to move into the former NPSPAC band, and that auction licensees only receive the same footprint in their new 800 MHz spectrum as they held prior to migrating (to free up sufficient spectrum at the upper end of 800 MHz to accommodate such site-based licensees).

licenses are in different geographic areas than are the site-based licenses.[6] Skitronics operates and markets all of its 800 MHz holdings, both EA and site-based, as one system. Under the *Rebanding Decision*, Skitronics would be entitled to move only its EA licenses to the new "cellular" band. As to its site-based licenses, relocation to the "cellular" band is allowed only if it implements digital cellular technology before the *Rebanding Decision* is published in the *Federal Register*, and then only if its cell sites contain 20 or more channels per cell. Skitronics cannot lawfully put in 20 channels per cell under the current rules, so Skitronics could never meet the cellular definition prior to *Federal Register* publication. Since Skitronics could not feasibly break up its current 800 MHz system into separate analog and digital systems, it could not even implement digital for its EA channels.

Separately, because Skitronics' site-based channels are virtually all "holes" in the middle of Nextel "donuts", they have had a resale value of $1.70 per MHz-pop (until the issuance of the *NPRM* eliminated the secondary market). However, if relegated to the cellular-prohibited band, Skitronics' spectrum holdings would be worth no more than 50¢-to-60¢ per MHz-pop, a loss in the range of ten million dollars. That is not the "value-for-value" that favored carriers, such as Nextel and Southern Linc, are receiving.

[6]Skitronics did this purposely, because the Commission rules expressly protected against forced migration of incumbents for the benefit of the auction winner, so it made sense to spend auction dollars on expansion areas.